Not For Publication **For upload**

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

Cecil Benjamin and Ferrynesia Benjamin,	)	
Plaintiffs,	)	Civ. No. 1996-071
v.	)	
Thomas Howell Group,	)	
Defendant.	)	

ATTORNEYS:

Lee J. Rohn, Esq.
St. Croix, U.S.V.I.
For the plaintiffs,

Michael J. Sanford, Esq.
St. Croix, U.S.V.I.
For the defendant.

MEMORANDUM

Moore, J.

Defendant Thomas Howell Group ["THG" or "defendant"] moves unopposed for summary judgment in this consolidated matter.[1] I deal here only with the motion as it relates to plaintiffs Cecil and Ferrynesia Benjamin [collectively "Benjamins"], who have moved to reconsider my April 4, 2001, denial of their request for

[1] This matter was consolidated with *Bryant v. THG*, Civ. No. 1996-121 and *Donovan v. THG*, Civ. No. 1997-059 on June 28, 1999 because of the similarity of issues and facts. Chief Judge Finch recused himself in *Benjamin* on February 4, 2000, but continues to preside over the remaining actions, which are still pending in St. Croix.

oral arguments and an evidentiary hearing. For the reasons set forth below, I will grant THG's motion for summary judgment and deny the Benjamins' motion to reconsider as moot.

I. FACTUAL AND PROCEDURAL BACKGROUND

After Hurricane Marilyn, the Benjamins' insurance carrier retained THG to adjust their property damage claim. The Benjamins assert that they gave prompt notice of their claim, but either were passed from one THG adjuster to the next or kept waiting months for an inspection of their property. Moreover, the Benjamins allege that their treatment by the THG adjusters was discourteous and unprofessional. Finally, they contend that THG misrepresented their claim to their insurance carriers. As a result, the Benjamins sued THG in this Court claiming, *inter alia*, breach of fiduciary duty and fair dealing, negligent misrepresentation, tortious interference of contract, intentional and negligent infliction of emotional distress, and breach of contract.[2]

THG served notice of its motion for summary judgment on November 8, 1999, as required by Local Rule 56.1(a)(1).

---

[2] The Benjamins also have alleged claims ranging from breach of THG's contract with its insurance carrier to defamation. These claims, however, are so lacking in merit and evidentiary support that I need not address them, save to dismiss them outright.

Plaintiffs sought and received several extensions of time to file a response to defendant's motion before THG filed its motion in court. After the Benjamins had received their third extension on December 27, 1999, the Court warned them that it would rule on THG's motion without the benefit of their response if they failed to file their response by January 19, 2000. After this deadline passed without the Benjamins' response, THG filed its motion unopposed on January 31st. Subsequently, the Benjamins filed a motion *nunc pro tunc* for an extension of time to respond. I denied their motion on February 10, 2000.[3]

Soon thereafter, the Benjamins requested oral argument and an evidentiary hearing on THG's motion for summary judgment, attaching their response to THG's motion. THG opposed their request for oral argument and evidentiary hearing and moved to strike the attachment. THG also moved for sanctions. I denied the Benjamins' motion on April 12, 2001.[4] The Benjamins moved to

---

[3] By order on February 4, 2000, Chief Judge Finch denied the motions for extensions of the plaintiffs in *Bryant* and *Donovan*. On February 10th, I adopted and applied Judge Finch's reasoning to deny the Benjamins' motion for an extension.

[4] On July 10, 2000, Chief Judge Finch denied the motions for oral argument and an evidentiary hearing of the plaintiffs in *Bryant* and *Donovan* and granted THG's motion to strike and its motion for sanctions. On April 12, 2001, I adopted and applied Judge Finch's reasoning to deny the Benjamins' identical motion.

reconsider my April 12th order on April 25, 2001.[5] This Court has diversity jurisdiction under section 22(a) of the Revised Organic Act of 1954[6] and 28 U.S.C. § 1332.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *see also Sharpe v. West Indian Co.*, 118 F. Supp. 2d 646, 648 (D.V.I. 2000). The nonmoving party may not rest on mere allegations or denials, but must establish by specific facts that there is a genuine issue for trial from which a reasonable juror could find for the nonmovant. *See Saldana v. Kmart Corp.*, 42 V.I. 358, 360-61, 84 F. Supp. 2d 629, 631-32 (D.V.I. 1999), *aff'd in part and rev'd in part*, 260 F.3d 228 (3d Cir. 2001). Only

---

[5] The plaintiffs in *Bryant* and *Donovan* moved to reconsider Judge Finch's order on July 24, 2000. Judge Finch denied their motions on December 14, 2000.

[6] 48 U.S.C. § 1612(a). The complete Revised Organic Act of 1954 is found at 48 U.S.C. §§ 1541-1645 (1995 & Supp.2001), *reprinted in* V.I. CODE ANN. 73-177, Historical Documents, Organic Acts, and U.S. Constitution (1995 & Supp.2001) (preceding V.I. CODE ANN. tit. 1).

evidence admissible at trial shall be considered and the Court must draw all reasonable inferences therefrom in favor of the nonmovant. *See id.*

B. THG Owed No Duty to the Benjamins

Virgin Islands law defines an "adjuster" as "any person who . . . investigates or reports to his principal relative to claims arising under insurance contracts, on behalf solely of either the insurer or the insured." 22 V.I.C. § 751(a). Virgin Islands law further differentiates between independent and public adjusters. An independent adjuster is "an adjuster representing the interests of the insurer," *see id.* § 751(a)(1), whereas a public adjuster is "an adjuster employed by and representing solely the financial interests of the insured named in the policy." *See id.* § 751(a)(2). What is clear from these definitions is that the beneficiary of the duty owed by an adjuster depends upon the type of adjuster.

The evidence before me shows that THG was hired by the Benjamins' insurance carrier to adjust their claim and that THG had no contractual relationship with the Benjamins regarding their claim against their insurance carrier. By statutory definition then, THG was an independent adjuster who owed its loyalty to the insurer and owed no duty to the insured Benjaminns regarding their insurance claims. *See Ruthardt v. Sandmeyer*

Steel Co., Civ. No. 94-6105, 1995 WL 649154, at *3, 1995 U.S. Dist. LEXIS 16580, at *7 (E.D. Pa. Nov. 6, 1995) ("In the absence of a contract with the insured, [an independent adjuster] owes no duty of good faith to the insured."); *accord Kerr v. Federal Emergency Mgmt. Agency*, 113 F.3d 884 (8th Cir. 1997) (holding that an independent adjuster owes no duty to the insured unless the adjuster undertakes a separate duty to the insured); *Rich v. Bud's Boat Rentals*, Civ. No. 96-3279, 1997 WL 785668, at *3, 1997 U.S. Dist. LEXIS 20236, at 7 (E.D. La. Dec. 18, 1997) (finding "no case imposing a duty on an independent insurance adjuster to an insured to conduct a proper investigation or to advise an insured of coverage issues"); *Continental Ins. Co. v. Application Group*, Civ. No. C93-03753, 1995 WL 91348, at *5, 1995 U.S. Dist. LEXIS 2614, at *14 (N.D. Cal. Feb. 15, 1995) (noting that an "independent adjuster, hired by the insurance company to adjust a disputed claim with its insured, does not owe a fiduciary duty to the insured with whom the dispute lies, absent facts demonstrating the independent adjuster assumed such a relationship") (citation omitted).

Moreover, even though a party may have a duty of good faith and fair dealing to another, such a duty is limited to those instances where a contract exists. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 ("*Every contract* imposes upon each party a duty of

good faith and fair dealing in its performance and its enforcement.") (emphasis added); *see also Jo-Ann's Launder Ctr. v. Chase Manhattan Bank, N.A.*, 854 F. Supp. 387, 390 (D.V.I. 1994) ("[W]here a duty of good faith arises it arises under the law of contracts, and there is no need to create a separate tort for breach of a duty of good faith."). As no contract existed between THG and the Benjamins, THG owed no duty of good faith and fair dealing to the plaintiffs. Accordingly, I must grant defendant's motion for summary judgment on plaintiffs' claims of breach of fiduciary duty and fair dealing.

C. THG Made No Negligent Misrepresentation to the Benjamins

Section 552 of the Restatement (Second) of Torts[7] lists the elements of negligent misrepresentation as (1) a false representation of a material fact; (2) the defendant's intent that the statement should be acted upon; (3) the defendant's failure to use reasonable care in distributing the information; (4) the plaintiff's reliance upon such a statement; and (5) damages. *See* RESTATEMENT (SECOND) OF TORTS, § 552; *see also In re Tutu Water Wells Contamination Litig.*, 42 V.I. 278, 285, 290, 78 F. Supp. 2d 456, 461, 464 (D.V.I. 1999). Inherent in section 552

[7] *See* 1 V.I.C. § 4 ("The rules of the common law, as expressed in the restatements of the law by the American Law Institute . . . shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.").

is also the requirement of an underlying duty of the defendant to the plaintiff and a breach of that duty. *See J.E. Mamiye & Sons, Inc. v. Fidelity Bank*, 813 F.2d 610, 615 (3d Cir. 1987); *I & S Assocs. Trust v. LaSalle Nat'l Bank*, Civ. No. 99-4956, 2001 WL 1287522, at *5, 2001 U.S. Dist. LEXIS 17049, at *17-18 (E.D. Pa. Oct. 23, 2001) (dismissing plaintiff's negligent misrepresentation claim upon finding that the defendant owed no duty to plaintiff); *Simmons v. Galin*, Civ. No. 97-6151, 2001 WL 1044904, at *2, 2001 U.S. Dist. LEXIS 13938, at *8-9 (E.D. Pa. Sept. 7, 2001) ("'Moreover, like any action in negligence, there must be an existence of a duty owed by one party to another' to successfully pursue a claim for negligent misrepresentation.") (citation omitted). As it is clear from the previous section that THG, as an independent adjuster, owed no duty to the Benjamins, as insureds of the insurer THG represented, the Benjamins cannot maintain their negligent misrepresentation claim.

D. There Was No Tortious Interference

The Restatement (Second) of Torts defines tortious interference with a contract as

> [o]ne who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting

> to the other from the failure of the third person to perform the contract.

RESTATEMENT (SECOND) OF TORTS, § 766 (1979); *see also Government Guar. Fund of Fin. v. Hyatt Corp.*, 35 V.I. 356, 369, 955 F. Supp. 441, 452 (D.V.I. 1997) (listing the elements of tortious interference). In addition to these elements, I must also look, *inter alia*, at the defendant's conduct and motive in determining whether THG tortiously interfered with the plaintiffs' insurance contracts. *See id.* § 767; *see also Lightning Lube v. Witco Corp.*, 4 F.3d 1153, 1170 (3d Cir. 1993) (noting that the plaintiff must establish that the defendant "specifically intended to harm [him]"). From the facts before me, it is evident that THG never intended to prevent the Benjamins' insurance company from performing its contract with the insureds. THG's intent was to provide the insurance company with the necessary information to perform its contractual obligations. The facts alleged by the Benjamins would, at most, constitute a breach of contract on the part of THG on its obligations to the insurance carrier, concerning which the Benjamins have no standing to mount a challenge. As the Third Circuit Court of Appeals has stated, moreover, "[b]reach of contract, without more, is not a tort." *See Windsor Sec., Inc. v. Hartford Life*

Ins. Co., 986 F.2d 655, 664 (3d Cir. 1993). Accordingly, the Benjamins' claim of tortious interference must also fail.

E. THG Did Not Inflict Intentional or Negligent Emotional Distress

The Benjamins have sued for the intentional and negligent infliction of emotional distress. These claims, however, are meritless.

First, to prevail on a claim of intentional infliction of emotion distress, the Benjamins must show that THG engaged in "conduct so extreme or outrageous that it falls outside the bounds of decency." *See* RESTATEMENT (SECOND) OF TORTS § 46(1)). "It is not enough that the defendant acted with tortious intent or even that he acted with malice." *International Islamic Cmty. of Masjid Baytulkhaliq v. United States*, 981 F. Supp. 352, 369 (D.V.I. 1997) (citing RESTATEMENT (SECOND) OF TORTS § 46(1) cmt. d). Whether or not THG's alleged conduct was discourteous and unprofessional, clearly it was not so extreme or outrageous as to warrant a claim for intentional infliction of emotional distress.

Second, to prevail on their claim of negligent infliction of emotional distress, the Benjamins must show that THG's negligent conduct placed their safety in danger and that they suffered some physical harm on account of their emotional distress. *See id.* at 370; *Mingolla v. Minnesota Mining & Mfg. Co.*, 893 F. Supp. 499,

506 (D.V.I. 1995) (describing the elements of negligent infliction of emotional distress); *Lempert v. Singer*, 26 V.I. 326, 766 F. Supp. 1356 (D.V.I. 1995) (holding that, absent any physical harm, plaintiff cannot prevail on negligent infliction of emotional distress). It is evident from the record that the Benjamins suffered no physical harm stemming from THG's conduct. Therefore, plaintiffs' claim must also be dismissed.

F. No Contract Existed Between THG and the Benjamins

Finally, as noted above, the Benjamins have failed to establish that THG entered into any contract or other agreement with them regarding their insurance claim. Therefore, as no contract existed between the parties, the Benjamins' claim for breach of contract will be dismissed.

III. CONCLUSION

THG owed no duty to the Benjamins because it was an independent adjuster hired to represent the interests of their insurance carrier. Therefore, the Benjamins' claims of breach of fiduciary duty, breach of good faith and fair dealing and negligent misrepresentation fail. In addition, the Benjamins cannot maintain their tortious interference action because there is no evidence that THG specifically intended to prevent their insurance company from performing its obligations. Moreover, the

Benjamins fail to establish claims for either intentional or negligent infliction of emotional distress. Finally, the Benjamins' breach of contract claim must be dismissed because there is no evidence they had any contractual agreement with THG. For these reasons, I will grant defendant's motion for summary judgment and dismiss this case.

ENTERED this 22d day of April, 2002.

FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

Not For Publication **For upload**

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

Cecil Benjamin and Ferrynesia Benjamin,	)	
Plaintiffs,	)	Civ. No. 1996-071
v.	)	
Thomas Howell Group,	)	
Defendant.	)	

ATTORNEYS:

Lee J. Rohn, Esq.
St. Croix, U.S.V.I.
For the plaintiffs,

Michael J. Sanford, Esq.
St. Croix, U.S.V.I.
For the defendant.

ORDER

For the reasons set forth in the foregoing Memorandum of even date, it is hereby

ORDERED that the motion of Thomas Howell Group for summary judgment (Docket No. 327) is **GRANTED**; and it is further

ORDERED that the motion of plaintiffs Cecil and Ferrynesia Benjamin to reconsider this Court's order of April 12, 2001 (Docket No. 351) is **DENIED** as **MOOT.**

ENTERED this 22d day of April, 2002.

For the Court

_____/s/_____
Thomas K. Moore
District Judge

ATTEST:
WILFREDO MORALES
Clerk of the Court

By:_____/s._____
Deputy Clerk

Copies to:

Hon. R.L. Finch
Hon. G.W. Barnard
Hon. J.L. Resnick
Mrs. Jackson
Lee J. Rohn, Esq.
Michael J. Sanford, Esq.
Michael Hughes